

November 2, 2007

## Proposed Decisionmaking Agenda

### Meeting of Public Records-Open Meetings Study Committee

November 9, 2007

1. Administrative Enforcement Scheme
2. Increasing Civil Penalties
3. Repeal of Criminal Sanctions in Chapter 22
4. Time Limits on Custodian for Responding to Record Request
5. Undue Invasion of Personal Privacy
6. Privacy and Court Records
7. Tentative, Preliminary, Draft Material
8. Government Employee Personnel Records
9. Job Applications for Government Employment
10. Chapter 22 Injunction Provision
11. Final Settlements
12. Applications of Public Records Law to Non-Governmental Bodies
13. Identical Exemptions for Chapter 21 and 22
14. Email Meetings
15. Walking Quorums
16. Reconvened Meetings Notice
17. Change in Chapter 22 Definitions

# **1. ADMINISTRATIVE ENFORCEMENT SCHEME**

## **Section 1 CITATION AND PURPOSE.**

This chapter may be known and may be cited as the “Iowa Public Information Board Act.” Its purpose is to provide an alternative means by which to secure compliance with and enforcement of the requirements of chapters 21 and 22.

## **Section 2 DEFINITIONS.**

1. “Board” when used in this chapter, unless the context otherwise requires, means the Iowa Public Information Board created by this chapter.
2. “Commissioner” means a member of the board.
3. “Complaint” means a written and signed document filed with the board alleging a violation of chapter 21 or 22.
4. “Complainant” means any person who files a complaint with the board.

1        5. “Custodian” means any government body, official, or government employee designated  
2        by §22.1(2) as the “lawful custodian”.

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4        6. “Governmental Body” means any body designated by §21.2(1).

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6        7. “Person” means one or more individuals, partnerships, associations, corporations, legal  
7        representatives, trustees, receivers, custodians, governmental bodies, and officials,  
8        employees, agencies, or political subdivisions of the state of Iowa.

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10       8. “Respondent” means any governmental body, custodian, government official, or  
11       government employee who is the subject of a complaint.

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13    **Section 3        BOARD APPOINTED.**

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15       The Iowa Public Information Board shall consist of five members appointed by the  
16       governor subject to confirmation by the senate and shall be balanced as to political affiliation as  
17       provided in §69.16. Members appointed to the board shall serve for four-year staggered terms  
18       beginning and ending as provided by section 69.19. A quorum shall consist of three members.

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20       Vacancies on the board shall be filled by the governor by appointment for the unexpired  
21       part of the term of the vacancy. Any commissioner may be removed from office by the governor  
22       for good cause. The board shall select one of its members to serve as chair and shall hire a  
23       director who shall serve as the executive officer of the board.

1   **Section 4       COMPENSATION AND EXPENSES.**

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3       Commissioners shall be paid a per diem as specified in §7E.6 and shall be reimbursed for  
4   actual and necessary expenses incurred while on official board business. All per diem and  
5   expense moneys paid to commissioners shall be paid from funds appropriated to the board.  
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7   **Section 5       ELECTION OF REMEDIES.**

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9       Any aggrieved person, any taxpayer to or citizen of Iowa, or the attorney general or  
10   county attorney, may seek enforcement of the requirements of chapters 21 and 22 by electing  
11   either to file an action pursuant to §21.6, §22.9, or §17A.19, whichever is applicable, or, in the  
12   alternative, to file a timely complaint with the Iowa Public Information Board created by this  
13   chapter. If several different persons seek enforcement of chapter 21 or 22 with respect to the  
14   exact same incident involving an alleged violation, and one or more of such persons elects to do  
15   so by filing an action under §21.6, §22.9, or §17A.19, and one or more of such persons elects to  
16   do so by filing a timely complaint with the Iowa Public Information Board, the court in which  
17   the §21.6, §22.9, §17A.19 action was filed shall dismiss the action without prejudice authorizing  
18   the plaintiff to file a complaint with respect to that same incident with the board without regard  
19   to the timeliness of the filing of that complaint at the time the action in court is dismissed. If a  
20   governmental body files an action pursuant to §22.8 seeking to enjoin the inspection of a public  
21   record, the defendant may remove the proceeding to the board for its determination by filing,  
22   within thirty days of the commencement of that judicial proceeding, a complaint with the board  
23   alleging a violation of chapter 22 in regard to the same matter.

1   **Section 6       BOARD POWERS AND DUTIES.**

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3       The board shall have authority to:

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- 5           a. Hire, on a full-time or part-time basis, and within the limits of its budget, such
- 6               employees as are necessary to execute its authority, including administrative
- 7               law judges, and attorneys to prosecute respondents in proceedings before the
- 8               board and to represent the board in proceedings before a court;
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- 10          b. issue rules with the force of law calculated to implement and to enforce the
- 11               requirements of chapters 21 and 22, to interpret the requirements of those
- 12               chapters, and to implement any authority delegated to the board by this
- 13               chapter;
- 14
- 15          c. issue, consistent with the requirements of §17A.9, declaratory orders with the
- 16               force of law determining the applicability of chapters 21 and 22 to specified
- 17               fact situations;
- 18
- 19          d. receive complaints alleging violations of chapter 21 or 22, seek resolution of
- 20               such complaints through mediation and settlement, formally investigate such
- 21               complaints, decide after such an investigation whether there is probable cause
- 22               to believe a violation of chapter 21 or 22 has occurred, and if probable cause

1 has been found prosecute respondent before the board in a contested case  
2 proceeding conducted according to the provisions of chapter 17A;

3  
4 e. issue subpoenas enforceable in court for the purpose of investigating  
5 complaints and to facilitate the prosecution and conduct of contested cases  
6 before the board;

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8 f. issue orders with the force of law, after appropriate board proceedings,  
9 determining whether there has been a violation of chapter 21 or 22, requiring  
10 compliance with specified provisions of those chapters, imposing civil  
11 penalties equivalent to and to the same extent as those provided for in  
12 §21.6(3)(a) or §22.10(3)(b), as applicable, on a respondent who has been  
13 found to have violated chapter 21 or 22, and imposing any other appropriate  
14 remedies calculated to declare, terminate, or remediate any violation of those  
15 chapters;

16  
17 g. represent itself in judicial proceedings to enforce or defend its orders either  
18 through attorneys on its own staff, the attorney general's office, or other  
19 attorneys hired or designated by the board, at its option;

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21 h. make training opportunities available to all custodians, governmental bodies,  
22 and other persons subject to the requirements of chapter 21 and 22 so that they

1           may be fully acquainted with and understand those provisions and their  
2           respective duties thereunder;

3  
4           i.   make available to the public informational resources calculated to acquaint  
5           them with their rights to access Iowa government information and proceedings  
6           and the obligations of custodians and governmental bodies under chapters 21  
7           and 22 and other laws dealing with this subject;

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9           j.   prepare and transmit to the governor and to the general assembly not less  
10          often than once each year, reports describing complaints received, board  
11          proceedings, investigations, hearings conducted and the outcome thereof,  
12          decisions rendered, and other work performed by the board;

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14          k.   make recommendations to the general assembly for such further legislation  
15          concerning public information as it may deem desirable in light of the policy  
16          of this state to provide as much public access as possible to government  
17          information and processes as is consistent with the public interest and the need  
18          to protect individuals against undue invasions of personal privacy.

1    **Section 7       FILING OF COMPLAINTS WITH THE BOARD**

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3           The board shall adopt rules with the force of law providing for the timing, form, content,

4   and means by which any aggrieved person, taxpayer to or citizen of Iowa, or the attorney general

5   or a county attorney, may file a complaint with it alleging a violation of chapter 21 or 22. In any

6   case, such a complaint must be filed within 60 days from the time the alleged violation occurred

7   or complainant could have become aware of the violation with reasonable diligence. All

8   proceedings of the board in response to the filing of a complaint shall be conducted as

9   expeditiously as possible. The board shall not charge a complainant any fee in relation to the

10   filing of a complaint, the processing of a complaint, or any board proceeding or judicial

11   proceeding resulting from the filing of a complaint.

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13   **Section 8       MEDIATION AND SETTLEMENT.**

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15           Upon receipt of a complaint alleging a violation of chapter 21 or 22, the board shall offer

16   the parties the opportunity to resolve the dispute through mediation and settlement. The

17   mediation and settlement process should enable the complainant to attempt to resolve the

18   dispute with the aid of a neutral mediator selected by the board. Mediation should be an

19   informal, non-adversarial process conducted in a manner calculated to help the parties reach a

20   mutually acceptable, voluntary settlement agreement. The mediator shall assist the parties in

21   identifying issues, foster joint problem solving, and explore settlement alternatives.

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1    **Section 9       ENFORCEMENT.**

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3           If any party declines mediation or settlement or if mediation or settlement fails to resolve

4   the matter to the satisfaction of all parties, the board shall initiate a formal investigation

5   concerning the facts and circumstances set forth in the complaint. The board shall make a

6   determination as to whether the complaint is within its jurisdiction and whether there is probable

7   cause to believe that the complaint states a violation of chapter 21 or 22. If the board concludes

8   after its investigation that the complaint is outside its jurisdiction or there is no probable cause to

9   believe that there has been a violation of chapter 21 or 22, it shall issue a written order

10   explaining its reasons for its conclusions and dismissing the complaint, and shall transmit a copy

11   thereof to the complainant and to the party against whom the complaint was filed. If the board

12   finds after its investigation that the complaint is within its jurisdiction and that there is probable

13   cause to believe that there has been a violation of chapter 21 or 22, the board shall issue a written

14   order to that effect and shall cause to be commenced before the board a chapter 17A contested

15   case proceeding against respondent. An attorney selected by the director of the board shall

16   prosecute the respondent in that contested case proceeding. At the termination of the contested

17   case proceeding the board shall, by a majority vote of its members, render a final decision as to

18   the merits of the complaint and issue any appropriate order to ensure enforcement of chapter 21

19   or 22 or to remedy any failure of respondent to observe any provision of those chapters. If the

20   board determines, by a majority vote of its members, that respondent has violated chapter 21 or

21   22, it may also require respondent to pay damages as provided for in §21.6(3)(a) or §22.10(3)(b),

22   to the extent that provision would make such damages applicable if complainant had sought to

23   enforce chapter 21 or 22 in court instead of through the board. A final board order resulting from

1 such proceedings may be enforced by the board in court and is subject to judicial review  
2 pursuant to §17A.19.

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4 **Section 10 DEFENSES IN A CONTESTED CASE PROCEEDING**

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6 A respondent may defend against a proceeding before the board charging a violation of  
7 chapter 21 or 22 on the ground that if such a violation occurred it was only harmless error, or that  
8 clear and convincing evidence demonstrated that grounds existed to justify a court to issue an  
9 injunction against disclosure under §22.8.

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11 **Section 11 JURISDICTION**

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13 The board shall not have jurisdiction over the Judicial or legislative Branches of State  
14 Government or any agency, officer, or employee of those branches.

## 2. INCREASING CIVIL PENALTIES

Amend the first sentence of §21.6(3)(a) as follows:

- a. Shall assess each member of the governmental body who participated in its violation damages in the amount of not more than ~~five~~ twenty-five hundred dollars nor less than one ~~hundred~~ thousand dollars.

Amend the first sentence of §22.10(3)(b) as follows:

- b. Shall assess the persons who participated in its violation damages in the amount of not more than ~~five~~ twenty-five hundred dollars nor less than one ~~hundred~~ thousand dollars.

### **3. REPEAL OF CRIMINAL SANCTIONS IN CHAPTER 22**

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3 Amend Section 22.6 as follows: Repeal the entire section.

## **4. TIME LIMITS ON CUSTODIAN FOR RESPONDING TO RECORD REQUEST**

Amend §22.2 by adding the following at the end:

Upon receipt of an oral or written request to inspect or copy a public record the custodian shall, if feasible in the ordinary course of business, permit such inspection or copying at that time. If it is not feasible in the ordinary course of business to permit inspection or copying of the public record at the time of the request, the custodian shall immediately notify the requestor, orally or in writing, as to when such inspection or copying may take place, which shall be no later than five business days from the time of the request unless there is good cause to delay further because of unusual circumstances. If a further delay is required the custodian shall furnish the requestor with a written statement of the reasons for that delay and the date by which the request will be satisfied.

If the custodian is in doubt as to whether the records requested are public records or whether the requestor should be permitted to examine or copy a §22.7 record, the custodian must make that determination within ten business days from the time of the request, and if inspection or copying of the record is to be permitted, it must be permitted within five business days from the time the custodian makes the decision to permit inspection or copying of the record. If a custodian denies a request to inspect or copy a record, the custodian must provide the requestor at the time of that denial a written statement denying the request and indicating the reasons for that denial.

1           If the custodian does not fulfill within the times prescribed in this section a request to  
2 examine or copy a public record, the request shall be deemed denied and the requestor shall be  
3 entitled to file a complaint with the Iowa Public Information Board or institute suit against the  
4 custodian pursuant to §22.10.

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6  
7 Section 22.8 subsection 4, paragraph d, code 2007, is amended to read as follows:

- 8  
9       d. To determine whether a section 22.7 record should be available for inspection and  
10       copying to the person requesting the right to do so. A reasonable delay for this purpose  
11       shall not exceed ten business days.

## 5. UNDUE INVASION OF PERSONAL PRIVACY

Amend §22.7 by adding the following new paragraph:

Material about and linked to identified or identifiable individual persons that, if disclosed, would constitute an unwarranted or undue invasion of personal privacy or that would present a clear and serious danger of facilitating identity theft or other criminal activity in relation to that person. An “unwarranted or undue invasion of personal privacy” means the public disclosure of particular information about and linked to identified or identifiable individual persons that is likely to subject those persons to potential harm to their personal privacy interests or personal security interests that outweighs any potential benefit to the public interest from that disclosure. Material about and linked to identified or identifiable individual persons excluded from public inspection by this paragraph includes, but is not limited to, social security numbers, drivers license numbers, credit card and bank account numbers, and personal financial data other than the salaries of public officials and employees and any financial statements required to be filed by public officials or employees to avoid conflicts of interest.

Material exempted from public disclosure by this paragraph does not include information about and linked to an identified or identifiable individual person that is released by the custodian with the subject’s written consent or information with respect to the performance by public employees or officials of their duties.

## 6. PRIVACY AND COURT RECORDS

Section 602.6111, subsection 3, Code 2007 is amended by striking the subsection and inserting in lieu thereof the following:

3. The supreme court may issue rules requiring confidentiality of certain categories of material in records maintained by the courts that are about and linked to identified or identifiable individual persons and that if disclosed to the general public would constitute an unwarranted or undue invasion of personal privacy or that would present a clear and serious danger of facilitating identity theft or other criminal activity in relation to that person. The rules prescribed pursuant to this subsection should be consistent with the materials exempted from public inspection by §22.7( ), [new paragraph], and may specify the manner and format in which such confidential information is to be provided to a clerk of court, authorize the degree and nature of the disclosure of such confidential information to specified classes of persons, and indicate the manner and format in which such confidential information is stored and disclosed to appropriate persons by the court clerks. Rules issued by the supreme court pursuant to this subsection shall prevail over any other state laws and administrative rules.



## **7. TENTATIVE, PRELIMINARY, DRAFT MATERIAL**

Amend §22.7 by adding the following new paragraph:

Tentative, preliminary, draft, speculative, or research material, prior to its final completion for the purpose for which it is intended and prior to its submission for use in the final formulation, recommendation, adoption, or execution of any official policy or action by the public officials authorized to make such decisions for the government body. In any case, such materials shall be treated as a public record at the time they are actually used as the basis for the final formulation, recommendation, adoption, or execution of any official policy or action of a government body.

## 8. GOVERNMENT EMPLOYEE PERSONNEL RECORDS

Sec. \_\_. Section 22.7, subsection 10, Code Supplement 2007, is amended by striking the subsection.

Sec. \_\_. Section 22.7, Subsection 11, Code Supplement 2007, is amended to read as follows:

11. Personally identifiable information in personnel records of government bodies relating to individuals who are officials, officers, or employees of the government bodies. However, the following information pertaining to such individuals contained in personnel records shall be public records:

- a. The name and compensation of the individual.
- b. The date the individual was employed by the government body.
- c. The positions the individual holds or has held with the government body.
- d. The individual's qualifications for the position that the individual holds or has held including, but not limited to, educational background and work experience.
- e. Any final disciplinary action taken against the individual that resulted in the individual's discharge, suspension, demotion, or loss of pay.

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## 10. CHAPTER 22 INJUNCTION PROVISION

Amend Section 22.8(1) as follows:

Such an injunction may be issued only if the petition supported by affidavit shows and if the court finds any one ~~both~~ of the following:

- a. That the examination would clearly not be in the public interest because the potential harm to the public interest from disclosure of the particular information involved outweighs any potential benefit to the public interest from that disclosure; or
- ~~b. That the examination would substantially and irreparably injure any person or persons.~~  
  
b. That the examination would substantially and irreparably injure a person because it would invade the personal privacy of the identified subject of the record and the harm to that person from such disclosure is not outweighed by the public interest in its disclosure; or
- c. That the record at issue is not a public record or that it is record exempt from mandatory disclosure by §22.7 and that a determination by the custodian to permit inspection of the record by one or more members of the public is a violation of law or is arbitrary, capricious, unreasonable, or an abuse of discretion.

## 11. FINAL SETTLEMENTS

Amend §22.13 as follows: Insert prior to the existing language of this provision the following language.

All final binding settlement agreements between any agency or other unit or official of state or local government that definitively resolve a legal dispute between that governmental body and another person or entity shall include a brief summary indicating the identity of the parties involved, the nature of the dispute, any underlying relevant facts that are agreed to by the parties, and that are disputed by the parties, and the terms of the settlement, and shall be filed with the governmental body and be available for public inspection. When necessary to secure consent of the non-governmental party to such a settlement agreement and, thereby, to avoid further legal proceedings, the agency or other unit or official of state or local government may, upon a written finding explaining why such a deletion is in the public interest, delete from the settlement agreement when it is made available for public inspection those details that would identify the other person or entity involved.

## 12. APPLICATIONS OF PUBLIC RECORDS LAW TO NON-GOVERNMENT BODIES

Amend §22.2(2) by adding the following new sentence to the end of that provision:

All records created by, in the possession of, or under the control of, any non-governmental body or person that are a part of the execution or performance of the duties imposed upon such a body or person by a contract with a governmental body whereby the non-governmental body or person performs a function of the governmental body are government records. The lawful custodian of such government records is the governmental body with whom the non-governmental body or person made the contract.

Amend §22.7(52) by deleting the entire introductory paragraph.

1                                   **13. IDENTICAL EXEMPTIONS**  
2                                   **FROM CHAPTERS 21 AND 22**  
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4   Section 22.7 is amended by adding the following new subsection:  
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6   NEW SUBSECTION: Records containing information that would permit a governmental body  
7   subject to Chapter 21 to hold a closed session pursuant to §21.5(1) in order to avoid public  
8   disclosure of that information.  
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11   **(See §21.5(1)(a) for an existing similar provision in Open Meetings Law)**

## 14. EMAIL MEETINGS

Amend Section 21.2(2) by adding the following new sentence at the end of that subsection:

Email communications by one or more members of a governmental body or by its chief executive officer sent to a majority of its members, or a series of such communications each sent only to a minority of its members but that in aggregate is sent to a majority of its members and that would otherwise constitute a meeting, concerning a particular matter within the scope of the body's policymaking duties, shall not be deemed to constitute a "meeting" if the emails, to the extent such emails are not exempted from disclosure by some provision of §22.7 or another statute, are either posted on the website of the body, or on its public bulletin board, or copies are made available for public inspection at the next regular meeting of the body.



## 15. WALKING QUORUMS

Amend Section 21.2(2) by adding the following new sentence at the end of the first sentence:

A “meeting” includes the calculated use of a series of communications, each between less than a majority of the members of a governmental body or their personal intermediaries, that is intended to reach and does in fact reach a majority of the members of the body and is intended to discuss and develop a collective final agreement of a majority outside of a meeting with respect to specific action to be taken by the majority at a meeting.

OR

A “meeting” includes a series of pre-arranged gatherings each of which involves less than a majority of a governmental body’s members but that collectively involves a majority of its members where the series of gatherings includes deliberation or action upon the same matter within the scope of the body’s policymaking duties, with the specific intention of developing in those series of gatherings a collective final agreement of a majority outside of a meeting concerning action to be taken by a majority at a meeting.

## 16. RECONVENED MEETINGS NOTICE (Revised)

Sec. \_\_. Section 21.4, subsections 1 and 3, Code 2007, are amended to read as follows:

### 21.4 PUBLIC NOTICE.

1. Except as provided in subsection 3, a governmental body, except township trustees,  
shall give notice of the time, date, and place of each meeting including a reconvened  
meeting of the governmental body, and the tentative agenda of the meeting, in a  
manner reasonably calculated to apprise the public of that information. Reasonable  
notice shall include advising the news media who have filed a request for notice with  
the governmental body and posting the notice on a bulletin board or other prominent  
place which is easily accessible to the public and clearly designated for that purpose  
at the principal office of the body holding the meeting, or if no such office exists, at  
the building in which the meeting is to be held.

### 3.

Subsection 1 does not apply to any of the following:

- a. A meeting reconvened within 4 hours of the start of its recess where  
announcement is made in open session of the time, date, and place of the  
reconvened meeting and recorded in the minutes of the meeting and there is no  
change in the agenda.
- b. A meeting held by a formally constituted subunit of a parent governmental body  
during a lawful meeting of the parent governmental body, a recess in that meeting  
of up to 4 hours, or a meeting of that subunit immediately following the meeting  
of the parent body, if the meeting of the subunit is publicly announced in open  
meeting at the parent meeting and the subject of the meeting reasonably coincides  
with the subjects discussed or acted upon by the parent governmental body.

## 17. CHANGE IN CHAPTER 22 DEFINITIONS

Amend §22.1 as follows:

1. The term “record” includes information of every kind, nature, and form that is stored or preserved in any medium whatsoever, including but not limited to paper, electronic, or film media.
2. The term “government record” means all records owned by, created by, in the possession of, or under the control of, any unit, division, or part of state or local government or their officials or employees in the course of the performance of their respective duties.
3. The term “public record” means all “government records” as to which members of the public have an unqualified right to examine and copy, and includes all government records that are not designated by statute as either confidential records or optional public records.
4. The term “confidential record” means all “government records” as to which a statute prohibits access and copying by members of the public.
5. The term “optional public records” means all “government records” as to which a statute prohibits access and copying by members of the public unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information.